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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1311

ROBERT L. BURNETT, JR.,
Petitioner

versus

UNITED STATES OF AMERICA, ET. AL.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT L. BURNETT, JR.
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Houston, Texas 77025

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Petitioner, Robert L. Burnett, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, wherein that court dismissed the case without evaluation of the merits on the basis that the court lacked jurisdiction for pre-induction judicial review in a Selective Service case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not yet officially

reported. It appears in the Appendix to this petition at page A-11. The Findings of Fact and Conclusions of Law made by the District Court for the Eastern District of Texas are included in the Appendix at pp. A-1-9.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1970. A petition for hearing was filed in accordance with the Federal Rules of Appellate Procedure and was denied without opinion on December 18, 1970. The mandate was ordered stayed until February 5, 1971, and this petition for a writ of certiorari was filed within the 30 days allowed by the rules. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented by this case are as follows:

1. Whether a federal statute enacted to facilitate the operation of an administrative agency can preclude preinduction judicial review of a Selective Service case where a registrant has been denied his constitutional rights to procedural Due Process and Equal Protection of the Laws.

2. Whether a U.S. Court of Appeals can determine that a case be dismissed for lack of jurisdiction without evaluating the merits of the case, when the merits of the case are the very grounds which invoke the jurisdiction of the

federal courts for pre-induction judicial review.

3. Whether the failure of a Selective Service local board, an administrative agency, to review and consider competent and material evidence in a Selective Service registrant's file constitutes a denial of the registrant's constitutional rights to procedural Due Process and Equal Protection of the Laws.

4. Whether the classification of a Selective Service registrant as I-A without considering competent and material evidence in his file and where such evidence is not controverted is a classification without any basis in fact and whether such is a denial of Due Process and Equal Protection of the Laws to the extent that it may be prejudicial and damaging to the further processing of the registrant.

5. Whether the failure of Selective Service local board to grant a Medical Interview as provided for in the regulations when requested by a registrant is a violation of the Selective Service regulations resulting in a denial of procedural Due Process and Equal Protection of the Laws. And whether such an action may be prejudicial and damaging to the further processing of the registrant.

6. Whether the inclusion of an Armed Forces Physical Examination report into the record on appeal to a Selective Service appeal board, where such report was never considered in the original record at the local board, may be a denial of procedural Due Process and Equal Protection of the Laws resulting by prejudicing and damaging the

further processing of the registrant in the appeal board.

7. Whether the inclusion of an Armed Forces Physical Examination report into a Medical Interview, where such report was found in the district court to be inadmissible and expressly order such report to be stricken from consideration, deprived the registrant of his rights to procedural Due Process and Equal Protection of the Laws. And whether such inclusion prejudiced the Medical Advisor against the registrant and his medical evidence.

8. Whether the United States District Court erred in not holding a hearing for proof when it was shown to the Court that there had occurred certain instances in violation of the Court's orders and which may have denied the registrant Due Process and Equal Protection of the Laws.

9. Whether repeated violation of regulation by a Selective Service local board resulting in a denial of procedural Due Process and Equal Protection of the Laws may have resulted in conclusive and irreparable prejudice to the registrant and present an issue beyond the competence of the Selective Service board to hear and determine.

10. Whether a Selective Service registrant, who presents prima facie evidence of a medically disqualifying condition and history and where such is expressly described in regulations made pursuant to statute as cause for rejection for induction, can be denied a I-Y classification without consideration and review of the prima facie evidence and a controversion

or refutation thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; . . ."

Constitution of the United States, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Universal Military Training Act of 1967, 50 U.S.C.A. App. 460(b)(3):

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in any war in any form: Provided That such review shall

go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only where there is no basis in fact for the classification assigned to such registrant."

32 C.F.R. 1628.1

"1628.1 Purpose of Medical Interview.— The Surgeon General of the Department of the Army shall, from time to time prescribe or approve a list enumerating various medical conditions or physical defects that disqualify registrants for service in the Armed Forces. A medical interview of certain registrants by the medical advisor to the local board shall be accomplished for the purpose of screening and disqualifying at the local board those registrants who have conditions or defects enumerated in the list."

32 C.F.R. 1628.2 (b)

"(b) Whenever a registrant who is in Class I-A-O, or Class I-O claims that he has one or more of the disqualifying medical conditions or physical defects which appear in the list described in section 1628.1, the local board shall order him to present himself for interview with the medical advisor to the local board at the time and place specified by the local board at the time and place specified by the local board by mailing to

such registrant a Notice to Registrant to Appear for Medical Interview (SSS Form 219). . . . ."

32 C.F.R. 1622.17

"1622.17 Class I-Y: Registrant Not Eligible for a Lower Class Who Would Be Qualified for Military Service in Time of War or National Emergency. - In Class I-Y shall be placed any registrant who, under the provisions of section 1623.2 of this chapter, is not eligible for a lower class, and would be classified in Class I-A, Class I-A-O, or Class I-O but for the fact that he is found under applicable physical, mental, and moral standards to be not currently qualified for service in the Armed Forces and who would be qualified for such service in time of war or national emergency declared by the Congress."

32 C.F.R. 1622.1 (c) (d)

"(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed."

"(d) . . . Each registrant shall receive equal justice."

32 C.F.R. 1623.1 (b)

"(b) The registrant's classification shall be determined solely on the basis of the

official forms of the Selective Service System and such other written information as may be contained in his file. . . "

C 15 Army Regulations 40-501 as provided for in 32 C.F.R. 1628.1

CHAPTER I

GENERAL PROVISIONS

The provisions of this chapter apply to all individuals evaluated under the provisions of any other chapter contained in this regulation.

Section 1. INTRODUCTION

1-1. Purpose

This regulation provides medical fitness standards of sufficient detail to insure uniformity in the medical evaluation of--

a. Candidates for military service or persons in the military service in terms of medical conditions and physical defects which are causes for rejection or medical unfitness for military service.

b. Candidates for, and persons in, certain enlisted military occupational specialties and officer duty assignments, in terms of medical conditions and physical defects which are causes for rejection or medical unfitness for these specialized duties.

1-2. Objectives

The objectives of this regulation are as follows:

a. Chapter 2. Commission and enlist in the Active Army and its reserve components, enroll in the Advanced Course Army ROTC, and induct, under peacetime conditions, individuals who are—. . .

(2) Free of medical conditions or physical defects which would require excessive time lost from duty by reason of necessary treatment or hospitalization or most probably result in separation from the service by reason of medical unfitness. . . .

(3) Medically capable of satisfactorily completing required training.

(5) Medically capable of performing duties without aggravation of existing physical defects or medical conditions. "

CHAPTER 2

Section VII. EXTREMITIES

... 2-10. Lower Extremities ...

The causes for rejection for appointment, enlistment, and induction are— ...

c. Leg, knee, thigh, and hip. ...

(2) Authentic history or physical findings of an unstable or internally deranged joint causing disabling pain or seriously limiting function. Individuals with verified episodes of buckling or

locking of the knee who have not undergone satisfactory surgical correction..."

STATEMENT OF THE CASE

This case is a civil action originally instituted under the Military Selective Service Act of 1967, 50 U.S.C.A. App. 451, et. seq., seeking pre-induction judicial review of the I-A classification and induction order of Selective Service registrant and Petitioner herein, Robert L. Burnett, Jr., by Texas Local Board No. 74, Beaumont, Texas.

Having exhausted the administrative remedies available to him within the Selective Service System, the Petitioner filed a civil action in the United States District Court for the Eastern District of Texas. The action therein alleged that the Petitioner had been denied Due Process of the Law and Equal Protection of the Law by reason of the fact that certain competent and material evidence had been excluded from consideration by the Local Board and that the Petitioner was subsequently classified as I-A without any basis in fact. Further, the Petitioner complained that as a result of said denial of Due Process his case was irreparably prejudiced and damaged so as to prevent him from receiving any fair hearing within the Selective Service System.

The Petitioner sought a temporary restraining order until a hearing could be had and upon hearing the Petitioner, plaintiff therein, was granted a preliminary injunction enjoining his induction into the Armed Forces. Contemporaneously

the District Court made Formal Findings of Fact and Conclusions of Law.

In accordance with the findings and order of the District Court, the Petitioner was granted a Medical Interview. However, when it appeared that the Local Board had violated the order of the court not to consider any Armed Forces Examination report in the Medical Interview, the Petitioner filed a motion for an amended order. The District Court did not rule on the motion, rather it directed the Local Board, through the U.S. Attorney in Beaumont, Texas, to conduct another Medical Interview without the Armed Forces Examination report.

There followed another Medical Interview which again appeared to have been conducted in circuitious violation of the District Court's orders. A motion was subsequently filed by the Petitioner seeking additional and continuing injunctive relief and a request for a new hearing on allegations that the Local Board was violating the District Court's orders denying the Petitioner Due Process and Equal Protection of the Laws and further prejudicing the Petitioner's case.

Said motion was denied and the Petitioner then requested leave to appeal from the District Court's orders to the Court of Appeals for the Fifth Circuit. The District Court granted the Petitioner leave to appeal and entered an order enjoining his induction pending perfection of the appeal. Notice of appeal was filed in the District Court and forwarded to the Court of Appeals for the Fifth Circuit.

Therein the case was heard on oral argument but finally dismissed for lack of jurisdiction.

The Petitioner has argued that the Local Board's failure to consider competent and material evidence which was in his Selective Service file was a denial of Petitioner's constitutional rights to procedural Due Process and Equal Protection of the Laws. Further, Petitioner has argued that the Local Board's departure from statutory mandate has conclusively and irreparably prejudiced his case and that he is therefore entitled to judicial review of his classification and induction order despite section 460 (b)(3) of 50 U.S.C.A. App., and is entitled to a I-Y classification.

The Government has argued that section 460 (b)(3) prevents judicial review of the Petitioner's case until he has been inducted or refuses induction and is criminally prosecuted. The Government has argued only on this point making no other attack against the facts in the case.

REASONS FOR GRANTING THE WRIT

A Selective Service registrant is statutorily and constitutionally entitled to have all competent and material evidence in his file considered by his Selective Service local board when he is being classified by his board.

Statutorily, this proposition is set out in 32 C.F.R. 1623.1 (b) wherein it reads;

> "The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file . . . "

and further in 32 C.F.R. 1622.1 (c) it states:

> "It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. . . The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it."

and in 32 C.F.R. 1622.1 (d)

> ". . .Each such registrant shall receive equal justice."

These procedures as set out in the aforementioned regulations are supported as inviolable by the Due Process and Equal Protection clauses of the fifth and fourteenth amendments of the Constitution of the United States. A Selective Service registrant is entitled to have his claims considered by his local draft board having jurisdiction and when this procedure is violated serious constitutional questions arise which should be resolved by the proper court of law.

In the case at bar there was found in the District Court's formal Findings of Fact and Conclusions of Law that:

"(5) In May of 1969, the plaintiff

> submitted to the Local Board certain medical reports, letters, and affidavits relating to the condition of his right knee, which indicated that the knee was in such condition that he would not be medically qualified for service."

and

> "(16) At the time of the I-A classification of September 17, 1969, the aforesaid documents relating to the plaintiff's knee condition were not considered or reviewed by the Local Board, nor had they been considered or reviewed at any time prior thereto."

The District Court's Conclusions of Law were stated, in part, as follows:

> "(1) The regulations in issue have been made pursuant to statutory arthority and, therefore, have the binding effect of statutes.
>
> (2) The action of the Local Board in its procedure was a clear departure by the Board from its statutory mandate; that is, the regulations issued in pursuance of statutory authority. No exercise of discretion by the Board in evaluating evidence is involved, and the court may take jurisdiction in the case to assure that procedural Due Process is followed.

(3) This court has jurisdiction of the case, since procedural Due Process has not been accorded the plaintiff.

(5) The Local Board's disregard of the medical evidence and failure to give plaintiff a medical interview, in addition to denying plaintiff Due Process, also denied plaintiff Equal Protection of the Laws.

(8) The action of the Local Board, in substituting an Armed Forces Physical Examination for the medical interview was contrary to the statutory scheme of the Selective Service System and was in violation of Due Process.

(12) The plaintiff was prejudicially deprived of an important step in his classification process, that is, his indispensable right to an impartial quasi-judicial action; that is, draft board proceedings to accord him a medical interview which were established for his protection.

(15) The Board must make an independent determination of the plaintiff's claims as to his physical condition without the consideration of any medical examination which may have been performed by the Armed Forces."

Now the foregoing excerpts from the Findings of the District Court constitute

a large measure of the merits of this case on appeal. They are also the basis upon which the District Court established jurisdiction of the case despite section 460 (b) (3) of 50 U.S.C.A. App. This is a section of the statute admittedly enacted for the smooth functioning of the Selective Service System without litigious interruption. Properly applied, the statute certainly has a desirable effect and is certainly constitutional. However, when such a section of the statute, designed merely for the smooth operation of an administrative agency, is employed in an attempt to prevent one, who has been denied his procedural rights established by statute and regulations and guaranteed by the constitution, from having judicial review before he is illegally inducted into the Armed Services is to construe the Act with unnecessary harshness.

This Supreme Court has enunciated several concepts in its decision in Oesterreich v. Selective Service System Local Board No. 11, 393 U.S. 233, 89 S. Ct. 414 (1968) which can be applied in the instant case. In addition, this Court's ruling in Oesterreich broadened the narrow scope of jurisdiction for federal courts in Selective Service cases. At page 238 of that case this Court held:

> "In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. . . To hold that a person deprived of his statutory exemption is such a blantantly lawless manner must either be inducted and

> raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. . ."

> "No one, we believe suggests that 10 (b)(3) can sustain a literal reading. For while it purports on its face to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent. Examples are legion where literalness in statutory language is out of harmony either with the constitutional requirements, United States v. Rumley, 345 U.S. 41, 73 S. Ct. 543, 97 L. Ed. 770, or with an Act taken as an organic whole."

Although the case at bar does not involve use of the delinquency concept, it does involve an abuse of discretion and, as found by the District Court, a denial of procedural Due Process and Equal Protection of the Laws as guaranteed by the constitution.

In his concurring opinion in Oesterreich, Justice Harlan addressed himself to the concept of procedure in classification. Therein he stated at page 241:

> "It is properly presumed that a registrant's board has fully considered all relevant

> information presented to it, and that it has classified and processed him regularly, and in accordance with the applicable statutes and regulations."

Continuing, Justice Harlan said:

> "These factors are significantly altered where the registrant contends that the procedure employed by the Board is invalid on its face."

And further he states:

> ". . .a challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity, but also presents an issue beyond the competence of the Selective Service Boards to hear and determine."

The glaring fact, as established from the Petitioner's Selective Service file and the District Court's Findings of Facts and Conclusions of Law, is that the Local Board did not consider or review competent and material evidence in the registrant's file when classifying him as I-A and thereby denied him procedural Due Process. This fact creates serious constitutional questions that must be resolved by this Supreme Court as to whether a statute can deny a registrant judicial review of his Selective Service case when on the facts it can be shown that the registrant has been deprived of his constitutional rights to Due Process and Equal Protection

of the Laws.

The United States District Court considered the facts and merits of the case and from them concluded that the court had jurisdiction. However, upon appeal to the Court of Appeals, the case was dismissed for lack of jurisdiction without evaluation of the merits. But the merits of this case are exactly what constitute a basis for pre-induction judicial review. In addition, the Court of Appeals cited the cases of Clark vs. Gabriel, 1968, 393 U.S. 256, 258-59, and Edwards vs. Selective Service Board No. 111, 5 Cir. 1970, ____ F. 2d. ____ (No. 28910, Sept. 15, 1970) as controlling. But in each of those cases the local boards had considered the evidence in the registrants' files and made a determination with respect to said claims and thereby exercised its discretion. This was not the case in the Petitioner's case and therefore, those cases cited by the Court of Appeals cannot be applied. The Local Board in the Petitioner's case never even considered the evidence in his file, much less make a determination as to its merits.

The Supreme Court in Oesterreich examined his facts and the District Court in the case at bar examined the facts and both attached jurisdiction and rendered a judgment in favor of the plaintiffs. The Court of Appeals' dismissal of the Petitioner's case without evaluating the merits is thus incompatible with the course followed by this Court and the District Court. Moreover, this Supreme Court has stated in Oesterreich in the concurring opinion of Justice Harlan that: "Insubstantial claims can be weeded

out with dispatch." And the footnote thereto reads:

> ". . .a court should be hesitant to grant a preliminary injunction staying induction except upon a strong showing that the registrant is likely to succeed on the merits."

This certainly suggests that the merits of a case must be evaluated.

Here a U.S. District Court has taken jurisdiction of a Selective Service case and found serious violations of regulations and statutes by the Local Board resulting in a denial of procedural Due Process to the registrant. And the Court of Appeals has ruled that the District Court had no jurisdiction. This conflict upon a serious constitutional question presents issues properly resolved by this Supreme Court which may advance the ultimate termination of litigation. It appears that since the scope of judicial review in Selective Service cases was broadened by this Supreme Court, the Court of Appeals would prefer to have this Court decide any other cases involving pre-induction judicial review.

The U.S. courts have long held that when an administrative agency excludes competent and material evidence from administrative consideration that it is a denial of procedural Due Process. A Selective Service case in point may be found in Knox v. United States, 200 F. 2d. 398, 401 (9 Cir. 1952) wherein the court stated at page 338 headnote 4 and 5:

> "The courts have long held that 'failure to accord a registrant the procedural rights provided by Regulations invalidates the action of the draft board.'"

And at page 339 the court held:

> "The registrant is entitled to have his claims considered and acted upon by these local bodies the membership of which is composed of residents of his own community."

Collaterally, the Petitioner would cite cases in administrative procedures outside Selective Service law but just as applicable to the legal question. St. Joseph Stock Yards v. United States, 298 U.S. 38, 75 (1936); NLRB v. Burns, 207 F. 2d. 434, 436 (8th Cir. 1953); Donnelly Garment Co. v. NLRB, 123 F.2d. 215, 224 (8th Cir. 1941). All provide that exclusion by an administrative agency of competent and material evidence is a denial of Due Process.

The District Court stated in its formal Findings of Fact and Conclusions of Law that the medical reports, letters and affidavits were the only information in the registrant's file regarding the history and condition of his knee and remained such. Nevertheless, the Local Board did not review, controvert or otherwise consider the evidence and on this point Petitioner cites U.S. ex. rel. Morton v. McRae, 310 F.Supp. 328 (1970) at page 332, headnote #7:

> "Moreover, a local board must state it reasons for a denial

> when a registrant has met the statutory criteria. Dickinson v. United States, 346 U.S. 389, 74 S. Ct. 152, 98 L.Ed. 132 (1953)."

The Petitioner as a Selective Service registrant presented evidence which in accordance with the medical standards would cause him to be rejected for induction. The Local Board did not even address itself to the evidence much less controvert it. In this connection see Morton v. McRae additionally at page 332, headnote #8;

> "The constitutional requirement of some specificity in a Selective Service record is clear. A registrant is at least entitled to be told in what way his case is defective so that he has a reasonable opportunity to obtain evidence to support it. The local board should endeavor to point out exactly what items influence its opinion thereby providing the registrant-appellant a fair opportunity to attack those conclusions."

The Local Board never complied with the rulings as in the case above. In addition, the Local Board's dereliction of duty and violation of regulations is compounded by the fact that in November, 1969, when the Petitioner appeared at a personal appearance before his Draft Board he presented a lengthy treatise discussing his medical evidence and history and how it operated to reject him for induction as required by Army Regulations made pursuant to statute. At that time the Board would not discuss or review

the evidence with the Petitioner and told him that they could do nothing until the Armed Forces results were returned.

The Local Board's exclusion of the competent and material evidence resulted in the Petitioner being classified as I-A without any basis in fact. In United States v. Lloyd, 431 F. 2d. 160 (1970) at page 166 the Court said:

> "When Congress spoke of "no basis in fact for the registrant's classification' it meant 'no basis in fact' in the local board's record."

As found by the District Court, on September 17, 1969, and again on November 18, 1969 when the registrant was classified as I-A there was in the registrant's file only the "uncontroverted and undisputed medical evidence and history of a disqualifying condition." The Board could act only on the information in the Petitioner's file. It did not consider that evidence but nevertheless classified the Petitioner as I-A. Cases on this point, although not in the area of pre-induction review, establish a firm view. See United States v. Ransom, 233 F. 2d. 15, 1955, headnote #1:

> "It has been firmly established by the Supreme Court that when a registrant makes a prima facie showing for a desired classification the board may not deny him the classification unless it has a 'basis in fact' for the denial."

and in U.S. vs. Davilla, 429 F. 2d. 481 (1970) 5th Cir. the Court stated at page 483:

> "Once the registrant makes out a prima facie case of conscientious objection the local board may not deny conscientious objector status unless there appears of record evidence justifying the denial. Denial without such evidence is action without basis in fact."

Although Davilla and Ransom deal with conscientious objection and were criminal prosecutions, the same principle of establishing a "prima facie case" and "no basis in fact" must apply to every other status and especially a medical question where the objective requirements are set forth in regulations. In the cases above the registrants were prevented from pre-induction review because their claims had been considered and the boards had exercised their discretion. But since the boards had erroneously decided or misapplied the regulations their decisions were subject to review upon criminal prosecution of the registrants. In the case at bar there never was an exercise of discretion by the Local Board and therefore the cases are distinct. But on the point of "no basis in fact" the cases are alike and once jurisdiction is involved the I-A classification must be ruled without any basis in fact. Collaterally, Petitioner cites Pitcher v. Laird, 421 F. 2d. 1272 (1970), and United States v. White 421 F. 2d. 487 (1969) both of which were decided by the Fifth Circuit. In each case the registrants were either discharged from the Army or their conviction was set aside.

This Supreme Court allowed pre-induction review of a registrant's case in Breen v. Selective Service Board, 396 U.S. 460 (1970) where there was clear departure from statutory mandate. Mr. Justice Harlan concurred in Breen's case referring to Oestereich as follows:

> "I pointed out that judicial scrutiny of such legal contentions unlike the review of 'factual and discretionary decisions' pertaining to a board's classification of a particular registrant, presented no 'opportunity for protracted delay' in the operations of the Selective Service System. . ."

Failure to consider competent and material evidence just like the delinquency procedure deprives a registrant of Due Process.

Principally this Petitioner has been denied Due Process and Equal Protection of the Law by the exclusion of competent and material evidence from consideration by his Local Board. Petitioner argues that this denial of Due Process set in motion several occurrences which perpetuated said denial of procedural Due Process by the additional violation of regulations by the Local Board which in turn irreparably and conclusively prejudiced the Petitioner's case within the Selective Service System and the Armed Forces. That as such the Petitioner was subsequently deprived of the classification he sought and still seeks that of a I-Y classification. Those events are as follow and each contribute to the whole of the case and follow one after the other beginning with the first and most important to establish a basis for preinduction judicial review.

1. September 17, 1969 - Petitioner classified as I-A with Local Board failing to consider medical reports, letters and affidavits submitted by registrant in May of 1969.

2. September 17, 1969 - On September 15, 1969, Petitioner requested Medical Interview in accordance with 32 C.F.R. 1628.2(b). Local Board ignored request and sent registrant for Armed Forces physical in violation of regulations. See Benitez-Manrique v. Micheli 305 F. Supp. 334 (1969) at page 338, headnote #3 and page 338, headnote 4 and 5 and page 339.

3. November 13, 1969 - At personal appearance Petitioner presented treatise concerning his medical claims and the appropriate medical standards finding his condition and medical history as cause for rejection for induction. Again the Local Board did not consider or review the claims with the registrant but stated that they could not act until the Armed Forces results were returned.

4. November 18, 1969 - Petitioner was again classified as I-A without the Local Board acting on the Petitioner's evidence.

5. December 19, 1969 - Petitioner's case forwarded to the Appeal Board with the results of the Armed Forces Physical included in the file. Those results and findings were never considered by the Local Board. Submission of said results in the record on

appeal when they had not been considered in the original record violated the concept of records on appeals and prejudiced the Appeal Board against the Petitioner.

6. May 8, 1970 - Petitioner had a Medical Interview with a Medical Advisor to the Local Board. In violation of the District Court's order, the Local Board included in the record before the advisor the results of the Armed Forces Physical. Said inclusion prejudiced the advisor against the Petitioner's claims and evidence and prejudiced the results of the Medical Interview.

7. June 1, 1970 - A second Medical Interview was held as ordered by the District Court, but it appeared from facts surrounding the interview that information concerning the Armed Forces Physical had been circuitiously communicated to the examining physician and Medical Advisor again in violation of the District Court's order.

8. The District Court refused to hold a hearing for proof that the court's orders had been violated and Petitioner denied Due Process and his case conclusively and irreparably prejudiced.

All of the above instances sustain and support the Petitioner's contention that he has been consistently denied Due Process and Equal Protection of the Laws and that his case is conclusively and irreparably prejudiced to such a degree that he cannot receive a fair disposition of his case within the Selective Service System. Most of

the above circumstances were found in the District Court's Findings of Fact and Conclusions of Law and constitute to a large measure the merits of the Petitioner's case for pre-induction judicial review. Since the District Court and the Court of Appeals disagree as to the jurisdiction of the case, and since this Court has broadened the scope of judicial review, it is of the utmost importance to the Selective Service System, to every local board, to every Selective Service registrant and to the U.S. courts that this matter be resolved by this Supreme Court.

Although the facts are not the same, this case involves the same constitutional questions as did Oestereich, to wit: Whether a Selective Service registrant can be classified as I-A and ordered for induction by means of an illegal process denying the registrant of his constitutional rights.

The Petitioner has established that the Local Board violated regulations in classifying him and in ordering him for induction it did so illegally. Decisions in two Courts of Appeal have established judicial review of Selective Service cases where there have been violations of regulations. In order to determine a violation of regulations a court must examine the facts and thus the merits of the case. This is what the Court of Appeals for the Fifth Circuit appears to have failed to do, that is, determine whether there has been a violation of the regulations which has denied the Petitioner Due Process and Equal Protection of the Laws and prejudiced his case. In Townsend v. Zimmerman, 237 F. 2d

376 (6th Cir.) 1956, the court set aside an order of induction issued while on appeal from a classification was still pending. And in Wolff v. Selective Service Board 372 F. 2d. 817 (2nd. Cir.) 1967, the court held that:

> ". . . when the local board acts in flagrant disregard of the applicable regulations and thus clearly in excess of its jurisdiction, the courts may intervene at any time to remedy the situation."

CONCLUSION

The constitutional rights of a Selective Service registrant to procedural Due Process and Equal Protection of the Laws in the Selective Service System are being challenged by a statute enacted to facilitate the functioning of an administrative agency. This Supreme Court has enunciated a rule in its decision in Oesterreich which seems all but clear and has not set any firm criteria by which the U.S. courts may be guided. There has arisen a diverse body of decisions on Selective Service matters without respect to court level, whether trial or appellate. As an example, in this case, a United States District Court has invoked jurisdiction and found farreaching facts and made profound conclusions of law in granting a registrant some relief from the classification and induction orders of his draft board. On appeal for additional relief, the Petitioner has been refused relief with the Court of Appeals finding that the District Court did not have jurisdiction. The Court of Appeals announced its judgment without evaluation of

the merits which merits were so profoundly stated by the District Court. Conversely there have been numerous cases where the trial court held no jurisdiction but where the appellate court did. It appears from the Court of Appeals' reluctance to decide in the case that it desires to leave the decision on pre-induction review to this Supreme Court which broadened the narrow limits of review in its decisions in Oestereich and Breen. If this be the case then it is important that this Court resolve the issues and therefore all of the reasons above are urged as a basis for this Court to grant the writ of certiorari.

Respectfully submitted,

ROBERT L. BURNETT, JR. pro se
3503 Link Valley
Apartment #38
Houston, Texas 77025

A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
MAY 20 1970
James R. Clancy, Clerk, U. S. Court
By Virginia R. Lewis

ROBERT L. BURNETT, JR.

V.

UNITED STATES OF AMERICA, ET AL

CIVIL ACTION NO. 6649

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried upon the facts by the court without a jury, the court does hereby find the facts and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows:

FINDINGS OF FACT

(1) On or about June 9, 1965, the plaintiff-registrant, Robert L. Burnett, Jr., returned his Classification Questionnaire (SSS Form 100) to the Local Board thereby registering with the Selective Service System as required by law.

(2) In the Classification Questionnaire the plaintiff made reference to the physical condition of one of his knees, but, at the time he did not believe the condition to be disqualifying.

(3) On or about June 17, 1969, the plaintiff was classified 1-A.

(4) In the succeeding years of 1966, 1967 and 1968, the plaintiff was classified II-S; that is, [illegible] given a student deferment.

A TRUE COPY I CERTIFY
JOHN A. CHANEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
By Virginia R. Lewis
Deputy

Civ. Order Book
Vol. 10 Page 104

(5) In May of 1969, the plaintiff submitted to the Local Board certain medical records, letters and affidavits relating to the condition of his right knee, which indicated that the knee was in such condition that he would not be medically qualified for military service.

(6) The aforesaid medical reports, letters and affidavits submitted to the Local Board were placed in the plaintiff's Selective Service file and were not reviewed or considered by the Local Board.

(7) The medical evidence submitted by the plaintiff was the only such evidence in his file and remained the only information regarding the physical condition of his right knee until December of 1969. Also, said medical evidence was not controverted or disputed in any way.

(8) In the early part of September 1969, the plaintiff notified the Local Board that he had graduated from college.

(9) The Local Board, on September 9, 1969, ordered the plaintiff to report for an Armed Forces Physical Examination on September 17, 1969.

(10) On or about September 15, 1969, the plaintiff requested that the Local Board grant him a medical interview.

(11) At that time, the information relating to the plaintiff's knee condition had already been sent to the Armed Forces Examining Station in Houston, Texas.

(12) That plaintiff was not granted the medical interview he had requested at that time nor at any subsequent time.

(13) The plaintiff was examined by the Armed Forces physicians on September 17 and 18, 1969, and was subsequently determined as fit for military service.

(14) On the same date, September 17, 1969, the Local Board met and classified the plaintiff as 1-A, that is, as available for military service.

(15) At the time of the 1-A classification, the Local Board had no results or determination from the Armed Forces Physical Examination. The originals of the medical reports, letters and affidavits had been forwarded to the Examining Station, but there were machine copies of said documents in the plaintiff's file.

(16) At the time of the 1-A classification of September 17, 1969, the aforesaid documents relating to the plaintiff's knee condition were not considered or reviewed by the Local Board, nor had they been considered or reviewed at any time prior thereto.

(17) On or about October 15, 1969, the Local Board received a letter from the plaintiff requesting an appointment with the government appeal agent and requesting a personal appearance with the Local Board.

(18) The plaintiff met his appointment with the government appeal agent; and on November 13, 1969, the plaintiff had a personal appearance before one member of the Local Board.

(19) At the personal appearance, the plaintiff, in his "Text for Personal Appearance," called the attention of the Local Board to the information relating to the condition of his right knee which he had submitted. In the "Text for Personal Appearance", the plaintiff discussed how the condition

and history of his right knee disqualified him for military service under Army Regulations 40-501, Chapter 2, Section 7, (2-10), (c), (2). At such personal appearance, the plaintiff requested the Local Board to classify him 1-Y in accordance with the aforesaid Army Regulations.

(20) In his appearance before the Board, the plaintiff made reference to the fact that he desired a medical interview. The plaintiff said: "I would like to ask concerning the medical interview. I know that I requested a medical interview prior to my physical. I was under the impression that I was entitled to a medical interview for screening. Did the fact that I was not classified 1-A, 1-A-O or 1-O exclude me from a medical interview?" The member of the Board replied: "No sir; you need to relax until the physical records come back. We cannot act until they do, sir." The plaintiff stated: "Yes, sir. But you understand that, as a law student, I am taught to turn every stone." The member of the Board replied: "Yes, sir; I understand. Thank you for coming today."

(21) On November 18, 1969, the plaintiff was again classified 1-A by the Local Board. At that time, the Local Board had in the plaintiff's file only the uncontroverted and undisputed medical evidence and history of a disqualifying condition.

(22) On December 12, 1969, the registrant's Armed Forces Physical Examination results were submitted to the Local Board. The Armed Forces Physical Examination report determined that the plaintiff was fit for military service, and there was attached a so-called Statement of Acceptability.

(23) On December 16, 1969, the plaintiff filed and appeal from his 1-A classification of November 18, 1969.

(24) On December 19, 1969, the Local Board forwarded the plaintiff's file to the Appeal Board. In that file was the Armed Forces Statement of Acceptability finding the plaintiff fit for service, and said Statement had never been considered by the Local Board.

(25) On January 9, 1970, the plaintiff's file was returned from the Appeal Board, and by their vote of three to zero the plaintiff was classified 1-A.

(26) A classification card with the 1-A classification entered thereon was mailed to the plaintiff on January 9, 1970.

(27) On dates subsequent to his December 16, 1969 appeal, the plaintiff appealed to the Surgeon General, Army Recruiting Command, Hampton, Virginia, and on two occasions he appealed to the Texas State Director of Selective Service in Austin, Texas. All appeals were denied on the grounds that the plaintiff had been found acceptable for military service by the Armed Forces.

(28) On March 23, 1970, the Local Board mailed to the plaintiff an order to report for induction on April 15, 1970.

(29) On April 13, 1970, the plaintiff's induction was postponed by reason of the Temporary Restraining Order granted by the court in this cause.

(30) It is the invariable practice of the Local Board to base its determination upon whether or not a registrant is physically fit for military service upon the examination conducted by the Armed Forces. In other words, there was no consideration given to the medical evidence submitted by the registrant.

(31) There has never been a medical interview, as such, granted by the Local Board. The determination of the Armed Forces Examining Station as to a registrant's physical condition is always followed by the Local Board.

CONCLUSIONS OF LAW

(1) The regulations in issue have been made pursuant to statutory authority and, therefore, have the binding effect of statutes.

(2) The action of the Local Board in its procedure was a clear departure by the Board from its statutory mandate; that is, the regulations issued in pursuance of statutory authority. No exercise of discretion by the Board in evaluating evidence is involved, and the court may take jurisdiction in the case to assure that procedural Due Process is followed.

(3) This court has jurisdiction of the case, since procedural Due Process has not been accorded the plaintiff.

(4) The medical reports, letters and affidavits submitted by the plaintiff in May of 1969 were and remained uncontroverted and undisputed evidence of a medically disqualifying condition in accordance with C.F.R. Army Regulations 40-501, Chapter 8, Section 7 (8-19), (a), (2). The Local Board thus did not render plaintiff Due Process when it failed to give him a medical interview.

(5) The Local Board's disregard of the medical evidence and failure to give plaintiff a medical interview, in addition to denying plaintiff Due Process, also denied plaintiff Equal Protection of the Laws.

(6) At the time the plaintiff made his request for a medical interview on September 15, 1969, he was classified 11-A. At that time he had also been ordered to report for the Armed Forces Physical Examination. The regulation, 1628-2(b), provides that only those persons in Class 1-A, 1-A-O are entitled to ask for a medical interview. There is thus an invidious discrimination between those in Class 11-S and those in Class 1-A, 1-A-O and 1-O, with reference to the right to ask for a medical interview.

(7) After the plaintiff was classified 1-A on September 17, 1969, his application for the medical interview was pending before the Local Board, and he was thereupon entitled to a medical interview.

(8) The action of the Local Board, in substituting an Armed Forces Physical Examination for the medical interview, was contrary to the statutory scheme of the Selective Service System and was in violation of Due Process.

(9) The Local Board had a duty to comply with the regulations and grant the medical interview when the claim of a disqualifying condition was made by the plaintiff, both before and after September 17, 1969.

(10) It was not within the province of the Local Board to delegate its functions as to the medical interview to the Armed Forces Medical Personnel, since the Armed Forces was an interested party in a proceeding before the Local Board.

(11) The plaintiff was entitled to an interview by a medical examiner, acting as an impartial advisor to the Local Board.

(12) The plaintiff was prejudicially deprived of an important step in his classification process, that is, his indispensable right to an impartial quasi-judicial action; that is, draft board proceedings to accord him a medical interview which were established by law for his protection.

(13) The plaintiff is entitled to a preliminary injunction, restraining and enjoining the local draft board and the Selective Service System from inducting him into the Armed Forces until the procedures outlined by statute and regulations have been complied with.

(14) The Board must accord the plaintiff a medical interview prior to any further examination by Armed Forces medical personnel.

(15) The Board must make an independent determination of the plaintiff's claims as to his physical condition without the consideration of any medical examination which may have been performed by the Armed Forces.

SIGNED and ENTERED this 20th day of May, 1970.

UNITED STATES DISTRICT JUDGE

A-9

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
MAY 21 1970
James R. Cooney, Clerk
By Virginia K. Baker

ROBERT L. BURNETT, JR.
V.
UNITED STATES OF AMERICA, ET AL

Civil Action No. 6649

ORDER

In accordance with the Findings of Fact and Conclusions of Law made and entered in this cause, it is

ORDERED that a preliminary injunction issue in this cause.

SIGNED and ENTERED this 21st day of May, 1970.

UNITED STATES DISTRICT JUDGE

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
By Virginia K. Baker

Civ. Order Book
Vol. 26 Page 1

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30176

D. C. Docket No. CA 6649

ROBERT L. BURNETT, JR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

Before BROWN, Chief Judge, DYER, and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal id the above styled and numbered cause be, and the same is hereby, dismissed.

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 23, 1970

Issued As Mandate:

A-11

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30176

ROBERT L. BURNETT, JR.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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(November 23, 1970)

Before BROWN, Chief Judge, DYER and INGRAHAM, Circuit Judges.

PER CURIAM: Burnett appeals from the District Court's denial of his motion for a permanent injunction to prevent his induction into the armed forces. To justify pre-induction judicial review, Burnett claims that his local Selective Service Board had no basis in fact for refusing to classify him IV-F or I-Y for medical reasons. Without evaluating the merits of Burnett's claim, we conclude that the District Court had no juris-

diction to entertain his demand for pre-induction judicial review. 50 U.S.C.A. App. § 460(b) (3); *accord, Clark v. Gabriel*, 1968, 393 U.S. 256, 258-59; *Edwards v. Selective Service Local Bd. No. 111*, 5 Cir. 1970, ____ F.2d ____ [No. 28910, Sept. 15, 1970]. Consequently this Court has no jurisdiction to consider an appeal.

APPEAL DISMISSED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

A-13

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30176

ROBERT L. BURNETT, JR.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

(December 18, 1970)

ON PETITION FOR REHEARING

Before BROWN, DYER, and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

A-14

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

• • • • •

ROBERT L. BURNETT, JR.,
Petitioner

versus

UNITED STATES OF AMERICA, et. al.
Respondents

• • • • •

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

• • • • •

CERTIFICATE OF SERVICE

I, Robert L. Burnett, Jr., hereby certify that copies of foregoing Petition for a Writ of Certiorari were served upon the Attorneys of record for the Respondents on February ____, 1971. Service was made by mail to the U. S. Department of Justice, Civil Division, Appellate Section, Room 3706, Washington, D. C.

Robert L. Burnett, Jr.

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